IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO.02-3393

SHERRY ANDERSON **APPELLANT**

VS.

RAYMOND CORPORATION **APPELLEE**

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

THE HONORABLE STEPHEN REASONER,
UNITED STATES DISTRICT COURT JUDGE

APPELLANTS' BRIEF AND ADDENDUM

SUBMITTED BY:

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Plaintiff Sherry Anderson was seriously injured when she was ejected from a stand-up power truck and filed a State Court product liability action. The Defendant Raymond Corporation removed the case to U.S. District Court where it was set for trial and continued twice at the request of the Defendant most recently over the objection of Plaintiff.

Defendant moved to strike the Plaintiff's expert witness and requested a Rule 104 a hearing. The Plaintiff responded and the District Court on the 14th day of June 2002, without hearing granting the Motion to Strike, allowed Plaintiff to seek another expert but denied Plaintiff's request for Continuance from the September 6, 2002 trial as premature.

The Plaintiff located a new expert Sevart but the court indicated it belief that Plaintiffs disclosure of the expert was not timely, and struck the second expert and entered Summary Judgment, from which Plaintiff appeals.

The Appellant requests oral argument of twenty minutes for the Reason that this case deals with fundamental fairness and due process of law as relates to the preemptive and outcome determinative striking of expert.

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JURISDICTIONAL STATEMENT

A. The basis for subject matter jurisdiction of the case in the District Court is 28 U.S.C. sec.1332, which provides that District Courts shall have original Jurisdiction of all civil actions where the matters in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs and is between citizens of different states.

B. This court has appellate jurisdiction of this case pursuant to 28 U.S.C. sec. 1291, in that the Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

C. This appeal is timely in that the final order and judgments were Entered September 3, 2002and September 25, 2002 and the respective notice of appeal and amended notice of appeal were filed on September 19, 2002 and October 4, 2002.

D. Appellant asserts that this appeal is from a final order and judgment that disposes of all parties' claims.

v.

STATEMENT OF ISSUES

I.

THE DISTRICT COURT ERRED IN GRANTING MOTION FOR SUMMARY JUDGMENT TERMINATING THE CASE WITH PREJUDICE, AND FROM JUDGMENT FOR SUMMARY JUDGMENT TERMINATING THE CASE WITH PREJUDICE.

Robert Reich Sec. of Labor v. Conagra 987, F. 2d 1357 (8th Circ. 1993)

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Paddillas v. Stork-Gamco Co. 186 F. 3d 412 (3rd Circ. 1999)

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V.

THE DISTRICT COURT ERRED IN ITS ORDER ENTERED SEPTEMBER 25, 2002 WHICH RECONSIDERED BUT AFFIRMED THE

vii.

COURTS STRIKING OF EXPERT WITNESS, DENIAL OF CONTINUANCE,

AND DISMISSAL AS OUTLINED IN THE COURTS ORDER (DOC.NO. 56)

GRANTING SUMMARY JUDGMENT.

Harrell Motor Inc. v. Billy Flannery 272, Ark. 105, 612 S.W. 2d 727 (1981)

Anderson v. Liberty Lobby 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed 2d 202 (1986)

STATEMENT OF THE CASE

The Plaintiff Sherry Anderson was seriously injured when she was ejected from a stand-up power truck and filed a State Court product liability action.

The Defendant Raymond Corporation removed the case to U.S. District Court where it was set for trial and continued twice at the request of the Defendant most recently over the objection of Plaintiff.

Defendant moved to strike the Plaintiff's expert witness and requested a Rule 104 (A) hearing. The Plaintiff responded and the District Court on 14th day of June 2002, without hearing granted the Motion to Strike. Plaintiff moved for a reconsideration or in the alternative for a continuance to procure another expert. On July 15, 2002 the court denied the reconsideration, and the continuance as "premature", but allowed Plaintiff to procure another expert. The court stated "if after a good faith effort Plaintiff is unable to be ready for the September trial date, Plaintiff may renew her motion."

The Defendant moved for summary judgment and asked for reconsideration of the court's allowing a new expert.

The new expert was disclosed to the Defendant on August 9, 2002 and the parties were unable to agree on a timely deposition date. Plaintiff renewed motion for continuance to allow Defendant to complete Discovery,

and Defendant moved to strike the new expert.

The Court requested Plaintiff detail disclosure of the new expert and Defendant renewed its motion to strike, the Court believing Plaintiff did not comply with its order then struck the second expert and entered Summary Judgment. After order of dismissal the Court entered a subsequent order reconsidering, but affirming its dismissal with prejudice from which Plaintiff appeals.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

On August 1, 1996 Sherry Anderson was operating a Raymond power Truck when it turned and violently ejected her pinning her hip against the wall resulting in a fractured acetabullum and knee injury requiring surgical open reduction and internal fixation. (A-10).

Anderson alleged that the power truck was defectively designed was unreasonably dangerous, that Raymond failed to give adequate warning and was defective due to lack of a restraint system, and failed to instruct.

The Defendant Raymond denied the allegations and claimed comparative fault, misuse, and operator abuse.(A-17).

The Court scheduled the case for trial July 16, 2001. (A-9).

On the 20th day of June 2001, the Defendant Raymond moved for a continuance because their alleged key expert witness was on a vacation to Hawaii. (A-36).

Plaintiff objected to the continuance. (A-30), yet the Court over said objection rescheduled the trial for Feburary 11, 2002.

The Plaintiff filed Motions to compel discovery from the Defendant which were denied.(A-41).

The Defendant filed a motion to strike the testimony of the Plaintiff's

expert, filed a brief in support (A-46) and requested a hearing. (A-50).

The Plaintiff responded and filed the report of the expert (A-66) and brief in support (A-84) Plaintiff retained the expert through TASA at $225.00 per hour. (A-242).

The expert had been involved with a similar platform lift truck involving the Defendant. (A-246).

The expert testified as to the engineering concept of hazard analysis (A-296) and the design techniques to guard or warn. (A-297).

The expert to went the American Greetings factory and examined the power truck as a part of hazard analysis and stated “that definitely is a hazard in the fact that its just a plain opening there that I could see right away that it is a hazard”. The expert’s extensive interview questions, drawings, and photographs used in his analysis commence at (A-528), his extensive curriculum vitae appears at (A-548-A).

The American National Standard for narrow aisle trucks indicated that operator enclosures are optional but with respect to elevated truck operator restraint is mandatory. (A-766-767).

Andrew D. Le Cocq’s preliminary report appears at (A-537) and finds that Sherry Anderson did nothing wrong, that the Raymond Model 20-530TN Power Truck was defectively designed and unreasonably dangerous

due to 1) open cockpit has no means of restraining the operator 2) no warning regarding the hazards in operating the truck 3) lack of fail safe design.

The Plaintiff Sherry Anderson testified that there were no warnings decals on the power truck. (A-338), that now she has a Hsyter sit down power truck that has a seat belt. (A-346).

Anderson testified that she swerved to go around the trains of merchandise and took her foot off of the dead man brake but got no braking and "it slung me out of it". If you'll notice on that truck there is no safety strap there to keep you in that truck. (A-356).

Dr. Guyton Orthopedic Surgeon detailed the history of her forklift injury as well a treatment. (A-363).

On 26th day of June, 2002, recorded July 1st 2002, the Plaintiff filed a Motion to Reconsider or in the alternative for a continuance setting forth that the expert Andrew Le Cocq had never been denied the right to testify and that the Plaintiff had a constitutional right to a jury trial on her claim of dangers so that the Court should permit her a reasonable continuance from the scheduled trail date of September 9, 2002 to procure other expert testimony. (A-112).

On July 3, 2002 the Defendant moved for summary judgment (A-115)

and filed its statement of undisputed facts. (A-122).

On July 10, 2002 the Defendant Raymond responded to Plaintiff's motion to reconsider or in the alternative for continuance,

On July 15, 2002 the Court denied the reconsideration of striking the Plaintiff's expert Lecocq and stated that there is no requirement for the Court to conduct a hearing.(A-127).

The Court also dismissed the Plaintiff's motion for continuance as premature (A-128) and noted that if after a good faith effort, Plaintiff is unable to be ready for the September trial date, Plaintiff may renew her motion for continuance. (A-128). The Court further noted that if the Defendant (emphasis added) objects to Plaintiff's new expert, it should file the appropriate motion by August 16, 2002. The Plaintiff's motion to Defendant motion for summary judgment would then be due on September 3, 2002 (A-129) only six days from the scheduled trial date.

The Plaintiff responded and filed a counter motion for summary judgment (A-130) and announced her intent again to hire other experts and stating that genuine issues of material fact remain under the strict liability theory in that the evidence established that the Defendant provided no operator restraint system or warning and no expert testimony, so that the Plaintiff is entitled to summary judgment. (A-131).

The Plaintiff filed her statement of undisputed facts which proved the Defendant supplied the power truck, that it had no operator restraint, no warnings and the Plaintiff suffered serious damages establishing a prima

statutory strict liability case. (A-133).

The Plaintiff filed the brief in support. (A-135).

Raymond filed its motion to reconsider the Court's decision to allow the Plaintiff to name a new expert and in the alternative for attorney fees. (A-139).

On July 29, 2002 the Defendant Raymond responded to Plaintiff's counter motion for summary judgment. (A-157).

On August 5, 2002 the Plaintiff responded to Raymond's motion to reconsider or in the alternative for attorney fees and brief in support. (A-161).

On August 16, 2002, the Plaintiff renewed her motion for continuance noting that the Court had allowed her response to summary judgment to remain open until September 3, 2002. The Plaintiff stated that there is a reasonable possibility that the expert could be deposed and the correct trial schedule maintained but out of an abundance of caution respectfully moved to renew her request for continuance. (A-166).

The Resume of John B.Sevart, establishes his credentials including service on the ANSIB56.1 Technical Committee which covers stand-up power trucks. (A-176).

The Plaintiff responded to the motion to strike and filed a brief in Support. (A-184).

On August 23, 2002 the Court sua sponte requested Plaintiff to set out the exact date, manner, and content of her disclosure to the Defendant and

Plaintiff responded, (A-187) and although the case was tried before new Rule 26, filed an immediate disclosure when the expert was retained with expedited report. (A-191).

The Defendant renewed its motion to strike with denied foot note 1. (A-193).

On August 30, 2002 the Court distinguished the cases cited by the Defendant but struck Plaintiff's expert disclosed on August 9, 2002, prior to the Courts August 16, 2002 (A-128) deadline for the Defendant, the September 3, 2002 deadline for Plaintiff's response to summary judgment, (A-128), the court without proper evidence stating "it does not believe the Plaintiff complied with its previous order Doc. 36". (A-198).

The Plaintiff had previously on August 27, 2002, filed an amended response to motion for summary judgment setting forth the affidavit of J.B. Sevart P.E. setting forth his report has a expert witness, (A-203) confirming that the Defendant Raymond knew who he was and setting forth prima facie liability on the part of Raymond. (A-204 et seq).

On September 3, 2002 the clerk filed the Courts order for summary judgment based on striking the Plaintiff's second expert; rejecting Plaintiff's argument that strict liability and negligence theories could advance, and dismissing the Plaintiff's complaint with prejudice. (A-223).

The Plaintiff had previously responded to the Defendant's motion to strike and reconsider on September 3, 2002 which was still timely and over looked by the Court. (A-225,228).

Sherry Anderson promptly filed her notice of Appeal September 19, 2002. (A-230).

The Court then entered an order September 25, 2002 fourteen days after the scheduled trial admitting that the Plaintiff's response time had not elapsed (A-234), granting the Plaintiff's motion to reconsider stating that although the Court expressly granted Plaintiff the right to renew her motion for continuance that he never stated that a continuance would be automatically granted and cited Hollingsworth v. U.S. 928 F.Supp.1023 (D.Idaho 1996) which will later be distinguished.

The Plaintiff filed her final notice of Appeal as to issues October 4,2002. (A-237).

SUMMARY OF ARGUMENT

The District Court abused discretion when it did not hold a 104 (a) Fed. Rul. Evid hearing and struck the Plaintiff's expert in violation of Amended Rule 702 Fed. Rul. Civ. Proc. McPike v. Corghi S.P.A. 87 F. Supp. 2d 890 (8th Circ. 1999)

The District Court further abused discretion when it ordered that Plaintif could renew her motion for a continuance and then ruled prematurely without Plaintiff's reply or hearing evidence to grant the continuance Sebastian A. Anzaldo v. S.W. Croes, 470 F. 2d 446 (8th Circ. 1973) Anges R. Nutt v. Black Hills Stage Lines Inc. 452 F 2d 480 (8th Circ. 1971).

Finally the Court failed to properly reconsider, alter or amend these erroneous rulings and improperly granted a summary judgment to the Defendant when Plaintiff had by her experts made a prima facie products liability claim under all of her theories and even without experts a prima facie case on statutory strict liability, Bobby D. French V. Grove Manufacturing Company, 656 F 2d 295 (1981)

Wherefore, Appellant respectfully prays for reversal, of summary Judgment and order striking Plaintiff's experts and that the case be remanded for jury trial and all other proper relief.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING MOTION FOR SUMMARY JUDGMENT TERMINATING THE CASE WITH PREJUDICE, AND FROM JUDGMENT FOR SUMMARY JUDGMENT TERMINATING THE CASE WITH PREJUDICE.

The standard of review of the District court summary judgment decision is de novo review with the Court of Appeals applying the same strict standard of the District Court. Robert Reich, Secretary of Labor v. Conagra, Inc. 987 F.2d 1357 (8th Circ. 1993).

Under 56(c) Fed.Rul.Civ.Proc. summary judgment is only appropriate where there is no genuine issue as to any material fact so that the moving party is entitled to judgment as a matter of law. The non movant:

> "need not prove in its favor each issue of material fact. All that is required is sufficient evidence supporting a material factual dispute to require resolution by a trier of fact."

Reich supra and Anderson v. Liberty Lobby 477 U.S. 242,257,106 S.Ct. 2505,2514, 91C.Fed. 2d 202 (1986)

The District Court erred in granting the Defendant's motion for summary judgment due to the Court's error of striking the Plaintiff's expert witness and denying the Plaintiff a reasonable continuance, and over looked a timely pleading so that after the summary judgment and dismissal the Court reconsidered but affirmed it's ruling, hence the second notice of appeal.

The Trial Court committed error because there was evidence that the Plaintiff could proceed under a theory of statutory strict liability without the expert's testimony. 4-86-102 Ark. Code Ann, 16-116-102 Ark.Code Ann, Harrell Motors Inc. v.Billy Flannery 272 Ark.105,612 S.W. 2d 727, AMI.1003 Rudd v. General Motors Corporation 127 F. Supp 2d 1330. (U.S. District Ct. Ala.2001)

On summary judgment by the Defendant, the Plaintiff a non-moving party was entitled to the Court viewing the evidence in the most favorable light and giving her every reasonable inference Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). The Court simply did not give the Plaintiff those inferences.

4-86-102 Ark. Code Ann. provides that a supplier of a product is subject to liability for damages if he is in the business of manufacturing or distributing a product, which was supplied in a defective condition, which rendered it unreasonably dangerous and the defective condition was the proximate cause of harm to a person.

The Plaintiff admits manufacture of the truck which bears its name, and the defective condition as set forth by the Plaintiff Anderson (A-356) establishes the defective conditions of no operator restraint system, or warning of said danger as well as the simple mechanics of the injury establishing proximate cause within the grasp of any jury. (A-356).

Under Arkansas law proof of a specific defect is not required where common experience teaches us that the accident would not have occurred in the absence of defect. Harrell Motors, Supra.

The common experience with this kind of injury is that seat belts do work are required as passenger cars, elevated power trucks and in fact provided on the Hyster that the Plaintiff now operates. (A-346).

The United States Court of Appeals has held that under Arkansas law, the Plaintiff is not required to bear the burden of showing alternative safer designs were available and possible in terms of cost, practicality, and technological possibility and notes the graveman of "defective" condition 'means a condition of a product that renders it unsafe for reasonably foreseeable use". Bobby D. French v. Grove Manufacturing Company 656 F.2d 295 (8th Circ.1981). Both the lack of restraint and no warning constitute

Defects, and Rudd v. General Motors Corporation, 127 F.Supp.2d 1330 (U.S. Dist. Ct. Ala. 2001).

makes it clear that a Defendant is liable if he puts on the market a product which is not reasonably safe and the Plaintiff is injured by the use of that product. The Alabama statute is drawn from the same restatement second of Torts Sec. 402A, as the Arkansas Rule and jury instruction.

> " While a prima facie case is not established by a showing of the mere fact of consumer injury or product failure, "the Plaintiff has proved a prima facie case where the evidence raises a reasonable inference from which the finder of fact may rationally conclude that Plaintiff's

> injuries and damages resulted proximately from the products failure of performance causally related to its defective condition".

Under FRCP 56(f) a party opposing summary judgment may request the Court to postpone the ruling until discovery is had.

This is precisely what the Plaintiff did by requesting a continuance for the reception of Sevart's testimony and the Courts refusal constitutes reversible abuse of discretion as discussed later in this brief, so that this Court should de novo reverse the summary judgment and remand for jury trial.

ARGUMENT

II.

THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO STRIKE TESTIMONY OF EXPERT WITNESS.

The standard on review is whether the Trial Court has abused discretion regarding its decision concerning rejection of expert testimony "and will not be disturbed on appeal absent abuse of discretion Peitzmeier v. Hennessy 97 F. 3d 293 (8th Circ.1996).

The Court erred in striking the Plaintiff's first expert witness Andrew Le Cocq who had been engaged for over 37 years in Human Factors Engineering and had worked on the Air Traffic Control System, design change of the F-16 cockpit, control for a new blood/cardioplegia System; CRT display for the Saturn S-1C booster checkout equipment, holds 4 U.S. patents, is a member of the Society of Automobile Engineering, MAE, B.S. Industrial Engineering and Mechanical Engineering as set forth in his curriculum vitae (A-78).

Le Cocq anaylized the operator inputs of Sherry Anderson as shown (A-66) the surrounding circumstances, force vectors dictated by the Law of Physics that Anderson encountered as well as validation of the underlying

scientific theory by citation to the learned treatise "Human Factors Engineering" by Earnest Jr. McCormack, McGraw-Hill, 1970.

The Trial Court applied Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579, 113 S.Ct. 2786, 125 L.ed. 469 (1993) in extremely rigid fashion to strike Le Cocq.

In Rick Dobler v. Unverferth Manufacturing Co. Inc., 98 1 F.Supp. 1284 (8th Circ.) the United States District Court for South Dakota found that where dealing with general engineering principals of a grain box we are:

> " not relying on any new science, but rather on simple engineering principals that have been in use for many years and are not particular to grain boxes"

In deed this very trial judge had in McPike v. Corghi S.P.A., 87 F. Supp.2d 890 (8th Circ. 1999) allowed "untested" changes based upon the fact that the proposed changes have been adopted and incorporated by various manufacturers over the last several years.

Sherry Anderson's current sit down Hyster power truck has a seat belt (A-346), and the Plaintiffs second expert not only performed extensive testing (A-204) on the forklift model in question but would have testified not only that the lack of a rear door or restraint render the Raymond truck defective, as did the failure to warn, but that Raymond has a "full length rear operator guard, "and does indeed make such a guard for the very model and

contends that the failure to advise of its availability renders the product defective. (A-205).

The case of Dhillon v. Crown Controls Corporation, 269 F. 3d 865 (7th Circ.2001) must be distinguished in that Plaintiff's second expert J. B. Sevart was excluded from testifying not because he had not engaged in testing;

> " It turns out that Sevart (at least) did conduct tests in 1991 and 1997 of forklift trucks with and without rear doors".

but because these tests were not put before the court.

It is also critical that Dhillon was decided by the Trial Court before the amendment of Fed. R.Evid. 702 which the Seventh circuit found that for the Court may admit expert testimony if; "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods to \ the facts of the case".

Perhaps the greater distinction between Dhillon and the instant case is that the Seventh Circuit requires testing of alternative designs whereas under French v. Grove Infra, Arkansas and consequently the Eighth circuit does not require the economic feasibility tests, so that this Court should at a minimum permit J.B.Sevart to testify.

In the Defendant's motion to strike, there was requested a Rule 104(a)

hearing to determine whether those expert witnesses would be permitted to testify so that the Plaintiff has a fundamental right to believe that the Court would at a minimum rule either for or against granting such a hearing.

Whether to hold such a hearing is in the sound discretion of the Court, however:

> "When the ruling on admissibility turns on factual issues, as it does here, at least in the summary judgment context, failure to hold such a hearing may be an abuse of discretion."

Padillas v. Stork-Gass Co. Inc. 186 F.3d 412 (3rd Circ. 1999).

In Padillas the Court went on to note that an abuse of discretion can also arise when the Courts decision resets upon a clearly errorous finding of fact, an errant conclusive of law or an improper conclusion of law to fact.

In the Eighth Circuit case of David Bright et al v. Standard Register Company, Inc. 66 F. 3d 171 (8th circ. 1995) the late Honorable Franklin Waters granted summary judgment which Plaintiff's argued was premature before the completion of discovery that would have revealed genuine issues of material fact requiring a trial.

This Honorable Court of Appeals noted that after the motion for summary judgment was filed the Plaintiff's did not move for a discovery continuance, nor did they advise the District Court of "the basis for, and

probative value of additional discovery".

Here the Plaintiff immediately moved for continuance and renewed the same with an affidavit and report of expert to indicate the probative value, before the Defendant moved for summary judgment.

This case was ready to try save and except for permitting a deposition or Rule 104 hearing on J.B. Sevart so that it was an abuse of discretion requiring reversal and remand for jury trial.

ARGUMENT

III.

THE DISTRICT COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR RECONSIDERATION. OF JUNE 14, 2002 ORDER AND DISMISSING PLAINTIFF'S MOTION TO CONTINUE SEPTEMBER 9, 2002.

A motion for reconsideration directed to a non final order is properly argued as a "Motion for Relief from Judgment or Order", rather than a Motion to Alter or Amend a Judgment and consequently the standard on review is for abuse of discretion Fed. Rules Civ. Proc. Rules 59(e), 60(b), 28 U.S.C.A. and Emmit Broadway v. Larry Norris et alia 193 F.3d 987 (8th Circ. 1999). In this regard the Plaintiff pointed out that the Defendant had requested a hearing on whether the expert would be Permitted to testify (A-112) which the Plaintiff contends was a just basis not only for reconsideration of the order but failure to hold hearing was an abuse of discretion as argued in part one. The Plaintiff also moved in the alternative for a continuance which the Court refused but expressly granted the Plaintiff the right to renew which will be argued in the next issue, to avoid duplication.

ARGUMENT

IV.

THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANT'S RENEWED MOTION TO STRIKE, FINDING

MOTION TO STRIKE EXPERT WITNESS MOOT; AND DENYING PLAINTIFF'S MOTION TO CONTINUE.

The issues set forth in Appellant's Notice of Appeal seem at times redundant but were set forth to adequately notice the appeal of each individual order as shown by Docket entry, the Plaintiff's contention that the Court engaged in an abuse of discretion to strike the Plaintiff's expert and rendering summary judgment are covered in the arguments of this brief so that the primary thrust of this point focuses on what Plaintiff believes was an abuse of discretion and reversible error for violation of this standard on review, to refuse to timely grant a reasonable continuance so that discovery could be completed and the trial schedule maintained rather than to foreshorten the time, and permit the Defendant to move for premature summary judgment.

The Trial Court accepted as good law the case of Hollingsworth v. United States, 928 F.Supp. 1023 (Dist. Ct. Idaho 1996) as permitting discovery to reopen for the purpose of allowing a new expert but read the case as not allowing for a continuance. In this regard, Hollingsworth

supra must be distinguished in that it was rendered January 17, 1996 and the trial was not until April 22, 1996 some four months later. In the instant case there was less than one month from the Court's entry of the order allowing Plaintiff to locate a new expert until the Court's order that the Defendant object to the new expert that has yet to be located.

Regrettably this Honorable Court can take judicial notice of the necessary delays of the postal requirements of legal correspondence, for as much as we all look forward to a society with "less than one degree of separation," the realities of legal communication and common sense compel that such a limited window to locate and qualify an expert was an abuse of discretion.

A motion for continuance is subject to the broad discretion of the Court but coupled with the obstructionist tactics of the corporate Defendant in this case, the denial of the continuance was an abuse of discretion. Sebastian A. Anzaldo v. S.W. Croes, 478 F.2d 446, (8th Circ. 1973).

As stated in Anges R. Nutt v. Black Hills Stage Lines, Inc. 452 F. 2d 480 (8th Circ.1971):

> "the burden should not have been placed upon them to do that within such a limited period…"
>
> "because of the error in denying appellant's motion

> for continuance, the judgment is reversed and the case remanded for a new trial…"

Here the Court hypothesized that despite less than one month to find a new expert for the Defendant to strike that the Plaintiff had not complied with its order.

In Remon Lee v. Mike Kemna, 534 U.S. 362,122 S.Ct. 877 the Supreme Court of the United States found:

> "although the judge hypothesized that the witness had abandoned Lee, no proffered evidence supported this supposition".

So that the failure to grant the reported continuance resulted in the decision being vacated and remanded.

The Plaintiff requested a reasonable continuance to preserve her fundamental right of due process of law.

The fundamental right of due process is the opportunity to be Heard not only at a meaningful time but in a meaningful manner.

Due process is flexible and calls for proceedual protections as particular situations demand, F. David Mathews Sec. H.E.W. v. Geo. H. Eldridge, 424 U.S. 319, 96 S. Ct. 893.

For this reason the Appellant respectfully contends that it was an abuse of discretion for the Court to not hold a 104 hearing or allow a reasonable continuance to permit the second expert to testify.

The Plaintiff can no longer advance her case or bear her burden when the Corporate Defendant need only suggest a lack of cooperation, Plaintiff requests reversal and remand for failure to grant a reasonable continuance.

ARGUMENT

V.

THE DISTRICT COURT ERRED IN ITS ORDER ENTERED SEPTEMBER 25, 2002 WHICH RECONSIDERED BUT AFFIRMED THE COURTS STRIKING OF EXPERT WITNESS, DENIAL OF CONTINUANCE, AND DISMISSED AS OUTLINED IN THE COURTS ORDER GRANTING SUMMARY JUDGMENT.

The Plaintiff's motion to reconsider was addressed to the Courts non-final order striking the second expert and so the standard on review as to reconsideration is abuse of discretion Emmit Broadway v. Norris, 193 F. 3d 987 (8th Circ. 1999) supra.

In the regard the Court at (A-234) agreed that the Plaintiff's deadline to respond to the Defendant's renewed motion to strike had not elapsed, however, the Court erred in its findings upon "granting reconsideration" that Plaintiff had offered no new argument other than the Court had granted Plaintiff the right to renew her continuance.

Actually the Plaintiff set forth several important reasons 1) that Plaintiff was denied her right to respond by pleading; 2) that the Court did not order the Plaintiff to have her expert deposed, and more importantly; 3) that the Plaintiff specifically denied telling the Defendant at any time that no deposition would be held; 4) that the Defendant never noticed any

deposition; 5) that the Plaintiff in good faith disclosed her new expert even before the retainer agreement when the expert was signed; 6) made formal disclosure the very day a preliminary report was available. Clearly this is an abuse of discretion entitling the Plaintiff to reversal and remand.

The practical effect of the final post judgment order of Court was to make the judgment final as earlier entered and both notices of appeal bring the entire matter for review.

The final summary judgment and order is reviewable de novo and has been discussed in a preceding argument.

The Trial Court erred in striking the Plaintiff's expert, Further 4-86-102 and Harrell Motors v. Billy Flannery 272 Ark. 105, 612 S.W. 2d 727, and the deposition of the Plaintiff make a prima facie case and at a minimum were genuine issues of material fact so that if the Court did not grant Plaintiff judgment and her continuance that under Rule 56 and Anderson v. Liberty Lobby 477 U.S. 242, 257, 106 S. Ct. 2505,2514, 91 L.Ed. 2d 202 (1986) the Plaintiff:

> "need not prove in its favor each issue of material fact.
> all that is required is sufficient evidence supporting
> a material factual dispute to require resolution by a
> trier of fact."

So that the Appellant Sherry Anderson respectfully prays that the Court reverse the summary judgment granted by the Defendant as well as

the order striking the Plaintiff's expert and remand this case for jury trial with Appellant to be awarded such cost and attorneys fees and all further relief as may be proper.

SHERRY ANDERSON

By:_____

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CONCLUSION

The Appellant respectfully concludes that the District Court erred in striking Plaintiff's expert without regard to Plaintiff's right to be heard by pleading or hearing; that the Court erred in failing to grant a reasonable continuance; erred in its entry of summary judgment and failed to address the same by reconsideration so that the Court of Appeals should reverse the summary judgment and order striking Plaintiff's expert and remand for a jury trial and all other appropriate relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

I served Appellant's Brief and Addendum by Federal Express overnite, orginial and 9 copies to the clerk, to Michael E. Gans , U.S. Court of Appeals for the 8th Circuit, 111 South 10th Street, Room 24.329, St. Louis, MO. 63102, by mailing two copies of it, and a disk scanned for computer virus, to James Simpson, 200 Regions Center, 400 W. Capitol Ave., Little Rock, AR. 72201, Francis H. Lococo 411 E. Wiscounsin, Milwaukee, WI 53202-4497, and Eric Lance Newkirk, 304 Broadway, West Memphis, AR. 72303, on November 5, 2002. This Brief complies with the type volume limitations of FRAP 32 (a)(7)(B) and (C). I prepared this Appellant's Brief and Addendum with Microsoft Word 14 Point, Times New Roman typeface. It contains 6213 words.

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Bill E. Bracey, Jr., Esq.